IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 23.11.2007

Coram:
The Honourable Mr. Justice V. DHANAPALAN

A.S. No.1150 of 1993

1 Vellingiri Gounder (died)
2 Rajendran
3 Mahendran
4 Sethuramalingam Appellants/Plaintiff

(Appellants 2 to 4 brought on record as Lrs of the deceased sole appellant as per order of Court dated 07.01.1998 in CMP No.609 to 611 of 1996)

vs.

1 Ayyaswami (died)
2 Pappathi Ammal
3 Radhakrishnan
4 Shanmugam
5 Arumugam Respondents/Defendant

(RR 2 to 5 brought on record as LRs of the first respondent vide as per order of Court dated 04.07.2002 made in CMP Nos.7097 to 7099 of 2000)

Appeal filed under Section 96 of Code of Civil Procedure against the judgment and decree dated 26.02.1993 made in O.S.No.711 of 1987 on the file of the II Additional Subordinate Judge of Coimbatore.

For appellants Mr. M.Duraisamy
For respondents Mr. Govi Ganesan

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J U D G M E N T

The unsuccessful plaintiff in O.S. No.711 of 1987 before the II Additional Subordinate Judge, Coimbatore is the appellant herein and his Legal Representatives have since been brought on record subsequent to his death. Similarly, the Legal Representatives of the deceased defendant also have since been brought on record.

2 The case of the appellant/plaintiff, as could be seen from the plaint, is as under:

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a The suit property which originally belonged to the plaintiff, was sold to the defendant for a consideration of Rs.50,000/- by way of a registered sale deed dated 07.05.1984 and on the same day, possession of the suit property was also handed over to the defendant.

b On the same day, the defendant also entered into a sale agreement with the plaintiff to the effect that he would execute a sale deed in favour of the plaintiff in respect of the suit property provided the latter pays a sum of Rs.50,000/- within a period of three years and a sum of Rs.50,000/- was also received by the defendant as advance.

c Before the expiry of the sale agreement, the plaintiff had informed the defendant that he was prepared to get the sale deed executed and had also sent a telegram to the defendant in this regard and this telegram was returned since the defendant had refused to receive it. The plaintiff had also met the defendant in person and had asked him to execute the sale deed whereas the defendant had turned deaf ears without any reason and the plaintiff's efforts through a mediator by name Rajappan bore no fruits. The plaintiff was in possession of the balance amount of Rs.49,000/- to be paid to the defendant and was also prepared to deposit the same before the Trial Court to get the sale deed executed through the court.

d The defendant was liable to compensate the plaintiff @ Rs.750/- per month for possession and enjoyment of the suit property. Though the Registrar had handed over the original sale deed to the defendant on the date on which it was entered into, the defendant had not returned the same and had given only the photocopy of the same and hence, the suit.

3 In reply, the defendant filed his written statement contending that:

a when the re-conveyance agreement dated 07.05.1984 was not executed within a period of three years as agreed to in it, the suit filed by the plaintiff on 15.07.1987 is barred by limitation;

b the plaintiff was never prepared to get the sale deed executed and had in fact, borrowed a sum of Rs.10,000/- from the defendant's wife by way of a promissory note dated 26.06.1984 besides getting a sum of Rs.5,000/- and in lieu of interest for the said amount, he let out his house to the defendant's wife and an agreement also was entered into in this regard on 07.10.1985;

c. the plaintiff never had the wherewithal to pay the balance amount of Rs.49,000/- and as such, he was not at all prepared to get the sale deed executed in terms of the agreement

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and the mere fact that he had not deposited the balance amount in the Trial Court itself would prove that he was not willing to act as per the terms of the agreement; and

d. the plaintiff is not entitled to receive any sum as compensation and had also not sent any telegram and as such, the suit had to be dismissed.

4 On the side of the plaintiff, the plaintiff examined himself as P.W.1 besides marking three exhibits, namely, sale agreement dated 07.05.1984, true copy of the telegram sent by him to the defendant and the certificate of the Superintendent of the Telegraph office. While no document was marked on the side of the defendant, he himself was examined as D.W.1.

5. The Trial Court, on consideration of the case of the parties, framed the following issues for consideration:

a. Whether the plaintiff is entitled to get the relief of specific performance in terms of sale agreement dated 07.05.1984?

b. whether the suit is barred by limitation?

c. Whether the plaintiff is entitled to get compensation;

d. to what other relief, the plaintiff is entitled to?

6. On an analysis of the oral and documentary evidence, the Trial Court, holding that the suit filed by the plaintiff is barred by limitation, has further held that the plaintiff is not entitled to the relief of specific performance since Ex.D.3 merely reads that the telegram has been rejected by the defendant's family members and does not clearly state by whom it has been rejected and also for the reason that the plaintiff has failed to examine anyone from the Telegraph office as witness. Holding so, the Trial Court has dismissed the suit with costs.

7. Heard Mr. Duraisamy, learned counsel for the appellant and Mr. Govi Ganesan, learned counsel for the respondents.

8. The learned counsel for the appellants has contended that:

a. the Trial Court has failed to appreciate that Ex.A.1, the sale agreement dated 07.05.1984 does not disclose the ingredients of an agreement to re-convey more so, when it does not even style itself as a contract to re-convey;

b. the Court below has failed to consider that in cases of a contract to re-convey, the stipulation has to be complied with within the stipulated period and there can be only one stipulation and nothing more;

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c. the Court below has also failed to appreciate that consideration for a contract to re-convey is the earlier sale in favour of the party agreeing to re-convey and there cannot be any other consideration;

d. the Trial Court has erred in not appreciating that the consideration for Ex.A.1 is the payment of advance of Rs.1,000/- and has also committed an illegality in not referring to the penal clause and the reason for introducing the penal clause which alone is sufficient to prove Ex.A.1 and this aspect has not been looked into by the Trial Court;

e. the Court below has failed to appreciate that the very fact that an advance was paid clearly indicates or discloses the intention of the parties to treat Ex.A.1 only as a contract to purchase the suit property; and

f. the Court below has failed to appreciate that the parties have used the words "sale agreement" instead of Agreement of Re-conveyance and introduced the clause such as receipt of certain amount as advance.

9. The learned counsel for the appellants, in support of his strenuous contention that the suit is within the period of limitation, has relied on Ex.A.2, the telegraphic notice dated 06.05.1987 sent by the plaintiff to the defendant. He has further contended that the plaintiff was always ready to perform the remaining obligation and the same has not been properly looked into by the Trial Court.

10. Per contra, Mr. Govi Ganesan, learned counsel for the respondents, has contended that while Ex.A.1 dated 07.05.1984 has stipulated a condition for three years, the execution of sale deed ought to have been made by 06.05.1987 on the expiry of three years whereas the suit came to be filed by the plaintiff only on 15.07.1987 and therefore, the Trial Court has rightly held that the suit is barred by limitation, by relying on a Division Bench judgment of this Court reported in AIR 1976 Madras 360 and has dismissed the suit and as such, there is no infirmity in the findings of the Trial Court.

11. Secondly, the learned counsel for the appellants, on the question of readiness and willingness, has contended that P.W.1 himself, in his deposition, has stated that he had no sufficient funds to purchase property and this categorical admission by the plaintiff has been rightly taken into consideration by the Trial Court to come to a conclusion that the plaintiff was not ready and willing to perform the obligation and to establish his case under Section 16(c) of the Specific Relief Act.

12. In support of his contentions, the learned counsel for the appellants has placed reliance on the following judgments:

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a. a judgment of this Court reported in 1997 2 MLJ 598 in the case of Periaswamy & 10 others v. Kaliammal and 2 others (paras 13 & 14)

> "For all the reasons stated above, I am of the view that the latter decision in Bibi Jaibunisha v. Jagdish Pandit and others, (1997) 2 LW 257 cannot be applied by me in preference to the earlier decision of a larger Bench of the very same Apex Court, which has dealt with the position more elaborately and accurately too after considering and applying the earlier rulings of the Privy Council and also of the Federal Court. All the more so, when the later decision by a smaller Bench of the Apex Court has been rendered without considering the earlier decision of the Supreme Court or dealing with the matter or the principles involved elaborately or objectively.
>
> For all the reasons stated above, the judgment and decree of the learned first appellate judge,dismissing the suit and also holding that the plaintiffs, on account of the default committed by them in not enforcing the agreement for re-conveyance in the manner agreed to and according to the terms and conditions contained therein, including the stipulation regarding the time, which does not merely operate as period of limitation, but more as a condition precedent, for such enforcement are not entitled to the relief sought for, do not call for any interference in my hands. The second appeal, therefore, fails and shall stand dismissed."

b. yet another judgment of this Court reported in AIR 1961 Madras 276 in the matter of N. Pattay Gounder v. P.L. Bapaswami (para 8):

> "The second ground of Sri. R. Gopalswami Ayyangar, namely that as no offer has been made by the purchaser or his assigns or their assignee to repurchase by tendering the required amount to the vendor within the specified time, the right to enforce the covenant was lost, has however, much force and has to be accepted. The stipulation in Ex.B.1 was that at any time after five years and within seven years of the execution of the deed the vendor could tender the sum of Rs.4000 to the purchaser and call upon him to reconvey the property to him.
>
> The deed expressly stated that this condition would be void after the expiry of the specified period. The right to purchase must be exercised according to the strict terms of the power. That English doctrine

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referred to in Fisher on Mortgages has been accepted by Sadasiva Aiar and Napier JJ in Samarapuri Chettiar v. Sudarsanachariar ILR 42 Mad 802; (AIR 1919 Mad.544), to be applicable to this country as well. The learned Judges have held that the doctrine that time may not be of the essence of the contract which arises on the construction of contracts of sale of immovable property, is not applicable to contracts of resale of property conveyed. The same principle was applied by the Federal Court in Shanmugam Pillai v. Annalakshmi Ammal, AIR 1950 FC 38. . .

Sri. K.S. Desikar, the learned counsel for the plaintiff-respondent referred me to Section 4 and Article 113 of the Limitation Act and contended that as the Court remained closed on 28.05.1953, the suit filed on the date of the reopening should be considered to be within time. In my opinion, the argument has only to be stated to be rejected. The period fixed in the document is a condition for the performance and after the expiry of the period, the right reserved itself is at an end. The period fixed for the deed is not the period of limitation prescribed to any suit. Section 4 of the Limitation Act can, therefore, have no application to the present case."

13. I have considered the rival submissions made by the learned counsel on either side and I have also given due consideration to the oral and documentary evidence in addition to the judgments relied on by the learned counsel for the respondents.

14. It is not in dispute that Ex.A.1 has been entered into between the plaintiff and the defendant on 07.05.1984. On the same day, i.e. on 07.05.1984, the defendant has agreed to sell the suit property to the plaintiff for the said sum of Rs.50,000/- within a period of three years and a sum of Rs.1,000/- was also received as advance by the defendant from the plaintiff. From the recitals of the said agreement, it is also seen that the defendant has to execute the sale deed in favour of the plaintiff on receiving the balance consideration of Rs.49,000/- before the expiry of three years period and as such, the sale deed should have been executed on or before 06.05.1987. Whereas, there was no notice issued by the plaintiff and only a telegraphic communication dated 06.05.1987 intimating that he is ready with the money to execute the sale deed and he would wait at the Sub-Registrar's office on 07.05.1987 at 11.00 a.m. has been sent by the plaintiff to the defendant, which according to the respondent is dated 07.05.1987. From this, it is clear that the telegraphic notice is one day after the expiry of the three year period. Thus, when the period of limitation stipulated in Ex.A.1 is over by 06.05.1987, the telegraphic notice which is said to be sent on 07.05.1987 is of no help to the plaintiff. Looked at from that angle, the cogent and convincing reasoning given by the Trial Court in coming

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to the conclusion that the suit is barred by limitation based on Exs.P.1 and P.2 and also on the basis of the judgment of this Court reported in AIR 1976 Madras 360 is perfectly in order and as such, I do not find any infirmity in the said finding of the Trial Court in this regard.

15. Secondly, on the question of readiness and willingness, it is quite relevant to refer to the deposition of the plaintiff himself, examined as P.W.1., who has stated that he did not have sufficient funds to purchase the property and this vital aspect of the matter has been given due consideration by the Trial Court. Besides that, the Trial Court has also found that the plaintiff has not taken any effort, much less serious effort, during the period of agreement to send any notice to the defendant expressing his willingness to get the sale deed executed except sending a telegraphic notice and that too, after the expiry of the three year period stipulated in the sale agreement. Even this telegraphic notice, according to the defendant, was not served on him. That apart, as rightly observed by the Trial Judge, it is not clear from Ex.A.3 as to which person in the defendant's family has refused to accept the telegram sent by the plaintiff and the plaintiff also has not called any person in the Telegraph office to the witness box. These series of events would only go to show that the plaintiff was never willing and ready to get the sale deed executed by the defendant and these aspects of the matter have been duly taken cognizance of by the Trial Judge while deciding the question of equitable and discretionary remedy in the matter of suit for specific performance and dismissing the suit.

For all the reasons stated above, this Court finds no merit in the appeal and the same is accordingly dismissed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

cad

Copy to

1. The II Additional Subordinate Judge, Coimbatore.

2. The Section Officer,
V.R.Section, High Court, Madras.

1 cc To Mr.K.Govi Ganesan, Advocate, SR.69705.

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